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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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NO. _____

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CITY OF SPOKANE and PETER G. FORTIN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Is the Inland Northwest Chapter of the American National Red Cross immune from local gambling tax by a municipality when such activity and taxation is conducted under the authority of the laws of the State of Washington?

2. If immunity from such taxation exists, must taxes collected without protest be refunded?

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## OPINIONS BELOW

U.S. District Court, U.S. v. Spokane, 734 F. Supp. 919 (E.D. Wash. 1989). Appendix A.

U.S. Court of Appeals for the Ninth Circuit, U.S. v. City of Spokane, 918 F.2d 84 (9th Cir. 1990). Appendix B.

## STATEMENT OF JURISDICTION OF THIS COURT

1. Review is sought of a judgment entered originally by the U.S. Court of Appeals for the Ninth Circuit, filed on October 31, 1990, and amended on November 27, 1990.

2. This Court has jurisdiction to review decisions of the U.S. Court of Appeals by writ of certiorari pursuant to 28 U.S.C. Sec. 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED IN THE CASE

1. The pertinent provision of the U.S. Constitution is Article VI, the Supremacy Clause, which reads in relevant part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

2. U.S. Constitution, Amendment X:

> AMENDMENT X--RESERVED POWERS TO STATES
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the State, are reserved to the States respectively, or to the peopole.

3. Pertinent provisions of the United States Code, 36 U.S.C. Sec. 3; Appendix C.

4. Pertinent provisions of the Revised Code of Washington (RCW) 9.46.0311, Charitable, nonprofit organizations -- Authorized gambling activities; Appendix D. RCW 9.46.0209, "Bona fide charitable or nonprofit organization"; Appendix E, RCW 9.46.110, Taxation of gambling activities -- Limitations -- Restrictions on punchboards and pull-tabs; Appendix F.

5. Pertinent provisions of the City of Spokane Municipal Code (SMC) 8.04.020. Appendix G.

## STATEMENT OF THE CASE

In 1973, the legislature of the State of Washington authorized certain types of gambling for the purpose of fund-raising for bona fide charitable organizations. The definition of bona fide charitable organizations, although not expressly identifying the American

National Red Cross, incorporated a definition that was nearly a verbatim quotation of the Congressional statutory language that created it. See RCW 9.46.0209, Appendix D; 36 U.S.C. Sec. 3, Appendix C. The Inland Northwest Chapter (INC) of the American National Red Cross began bingo and pull-tab activities in 1980, complying in all respects with the state regulatory scheme, including the procurement of a license and cooperation with enforcement officers of the Washington State Gambling Commission, and the payment of taxes to the City of Spokane.

After six years of tax payments to the City of Spokane, the INC requested a refund of all taxes in February, 1986. Due to the INC's historic compliance with the tax and all other regulatory requirements imposed by the

Washington State Gambling Commission, the City determined that gambling was an activity that was distinguished, both in law and by the INC's conduct, from its federally chartered mission, and the requested refund was denied. More than two years and nine months later, during which gambling taxes continued to be paid without protest, the United States filed the action now appealed in the United States District Court for the Eastern District of Washington against the City of Spokane and Peter G. Fortin, its Finance Director, petitioners herein. Jurisdiction of the trial court was established under 28 U.S.C. Sec. 1331. The City moved for summary judgment and the United States cross-moved. It was agreed by both sides that any factual disputes that existed were not material to the determination of the fundamental

dispute.

After the filing of briefs, oral argument and a motion to alter or amend judgment, the trial court ruled that:

1. The INC is an instrumentality of the United States when conducting gambling activities.

2. That the City of Spokane would refund taxes paid for the six-year period preceding the filing of the court action, applying the statute of limitation found at 28 U.S.C. Sec. 2415.

3. That the City of Spokane would pay pre-judgment interest only from the date which the INC first objected to payment of the taxes, which was February, 1986.

4. That the City of Spokane would cease collection of the tax.

The judgment was satisfied and the City of Spokane appealed to the United

States Court of Appeals for the Ninth Circuit, which affirmed the trial court on all issues, filing its judgment on October 27, 1990, and amending pursuant to a motion for clarification brought by the United States on November 27, 1990.

REASONS FOR ALLOWING THE WRIT

The decision of the District Court, sanctioned by the U.S. Court of Appeals, is a departure of federal power that infringes upon the constitutional authority of a sovereign state, and has not been, but should be, settled by this Court.

The Supremacy Clause of the U.S. Constitution, Art. 6, cl. 2, makes federal law the supreme law of the land. The issue of state taxation and its relation to federal supremacy was first addressed in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), where the

State of Maryland imposed a tax on federally chartered banks. In its opinion, which invalidated the tax, this Court observed that the power to tax, when abused, involved the power to destroy. The protection of the powers and objectives entrusted to the federal government had to be insulated from local influence, especially where that influence could have absolute control over the execution of those powers and objectives. Chief Justice John Marshal, however, neither negated the proposition of state sovereignty nor failed to recognize that certain matters fell within the sphere of state control when he stated that:

> The sovereignty of a state extends to every thing which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it

demonstrable that it does not. McCulloch, 4 Wheat. at 435.

The City of Spokane, petitioner herein, asserts that gambling is an activity over which the sovereign state retains the authority to prohibit, permit, or reasonably condition and, as such, may do so without offense to the Supremacy Clause of the United States Constitution.

In the case of Douglas v. Commonwealth of Kentucky, 168 U.S. 488, 503, (1897), the conflict between state-authorized gambling and the federal constitution arose. Mr. Douglas had acquired, from the City of Frankfort, the authority to conduct a lottery pursuant to Kentucky state law. Subsequently, the general assembly of Kentucky repealed the enabling statute and invalidated Mr. Douglas' franchise. He sued, and the action was eventually

appealed to this Court on the theory that Mr. Douglas' right to contract had been unconstitutionally impaired by acts of the Kentucky General Assembly. In ruling adversely to Mr. Douglas, this Court held that his right to gamble was not a contract, but a privilege, subject to the plenary control of the state:

> On the contrary, we hold that a lottery grant is not in any sense a contract, within the meaning of the constitution of the United States, but is simply a gratuity and license, which the state, under its police powers, and for the protection of the public morals, may at any time revoke, and forbid the further conduct of the lottery, and that no right acquired during the life of the grant, on the faith of or by agreement with the grantee, can be exercised after the revocation of such grant and the forbidding of the lottery, if its exercise involves a continuance of the lottery as originally authorized. All rights acquired on the faith of a lottery grant must be deemed to have been acquired subject to the power of the state, to the extent just indicated.

Douglas, 18 S. Ct. at 204.

The Douglas decision was based upon Stone v. Mississippi, 101 U.S. 814 (1879), which also involved the grant of a lottery and its subsequent revocation by the state, being brought to this Court by invocation of the same provision of the U.S. Constitution, Article 1, Sec. 10. While finding the grant of the franchise not to constitute a contract, this Court described the legal right to gamble as:

> . . . nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State.

Stone, 101 U.S. at 821.

The question of state control of gambling has been decided favorably to the states by their own courts and by the U.S. District Court for the District of Nevada. Thomas v. Bible, 694 F. Supp. 750 (D.C. Nev. 1988),

aff'd 896 F.2d 555 (9th Cir. 1990); Nevada v. Rosenthal, 93 Nev. 36, 559 P.2d 830 (1977), appeal dismissed, 434 U.S. 803. Congress, in the enactment of 18 U.S.C. Sec. 1084, involving the wire transmission of wagering information, specifically provided that it did so solely for the purpose of assisting state gambling regulation and not displacing it. This Court recognized local regulation of gambling in Posadas de Puerto Rico Ass'n v. Tourism Co., 478 U.S. 437, (1986), stating that;

> . . . the Puerto Rico legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising . . . .

478 U.S. at 345.

> It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity,

> but deny to the legislature the authority to forbid the stimulation of demand for the product or activity . . . .

478 U.S. at 346.

In this action, both the District Court and the Court of Appeals relied heavily upon the case of Department of Employment v. United States, 385 U.S. 355 (1966), in their holdings, where the State of Colorado attempted to impose unemployment insurance tax on the American National Red Cross. In holding the tax invalid under the Supremacy Clause, this Court addressed the Red Cross role as it is traditionally and statutorily contemplated. 36 U.S.C. Sec. 3, Appendix C. Department of Employment is distinguishable on the basis that it in no way addresses conduct of the Red Cross in any non-statutory function, such as gambling under a state grant of authority.

The opinions filed below both make specific mention of the fact that the gambling engaged in by the INC was "lawful" or "in compliance with state law," without addressing the authority of the INC to gamble directly. The City submits that if leave of the state, or compliance with state law, is necessary to legitimize the gambling activity, then the condition imposed by the State which authorizes local taxation is valid. The notion that the State may prohibit the activity but if allowed, it may not be taxed or otherwise conditioned, violates the rationale and purpose for which the rule of immunity was established. McCulloch v. Maryland, supra; Posadas de Puerto Rico Ass'n, supra.

Whether or not the State of Washington can prohibit the Red Cross from gambling, through its legislature,

is the heart of the issue the Petitioner asks this Court to address. If the INC acts in the role of an instrumentality of the United States government in conducting a gambling activity, and regulation of such activity is not reserved to the State by the Tenth Amendment, then no act of the state or a municipality may infringe upon that activity. If, however, the right to regulate gambling is reserved to the states by the Tenth Amendment, there is no unconstitutional impairment of federal sovereignty imposed by the conditions placed upon such activity by the State; i.e., local taxation.

The decision of the District Court, as affirmed by the Court of Appeals, also ordered a refund of all gambling taxes paid by the INC since November 21, 1982. Assuming that this

Court were to conclude that the INC is not subject to taxation on its gambling activities, the lower courts' decisions are not consistent with this Court's decisions on non-retroactivity. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); American Trucking Ass'n, Inc. v. Smith, ____ U.S. ____, 110 S. Ct. 2323, 110 L. Ed. 2d 148 1990).

The District Court and the Court of Appeals utilized the analysis established by this Court in Chevron Oil Co., but their reasoning is flawed. This Court has established that non-retroactivity of a decision is determined by applying the following three-factor test:

(1) Whether the decision established a new principle of law, either by overruling clear past precedent, or by deciding an issue of first impression whose resolution was

not clearly foreshadowed;

(2) Whether retroactive operation will further or retard the purposes of the rule in question; and

(3) Whether applying the decision will produce substantial inequitable results. Chevron Oil, supra at 106-07.

As to the first factor, the Court of Appeals concluded that its decision did not overrule precedent or decide an issue of first impression because it was basing its decision solely upon the status of the American Red Cross. The Court never reached the issue of first impression; that is, whether gambling is an activity reserved to the state under the Tenth Amendment, which the state may prohibit, permit, or condition, even if the purveyor is a federal instrumentality. This is an issue of first impression whose resolution is not clearly foreshadowed

by previous cases. This Court's decision in Department of Employment v. U.S., 385 U.S. 355 (1966), only resolved the issue of tax statue of the Red Cross and the immunity of its traditional relief operations, and did not address the unique issues raised by gambling activities.

In evaluating the second factor, the Court of Appeals concluded that retroactive operation of the decision would foster respect for the principle underlying the Supremacy Clause which precludes taxation of United States governmental functions. However, as this Court has previously observed, a narrow approach to governmental tax immunity is consistent with competing constitutional imperatives and gives full range to each sovereign's taxing authority. United States v. New Mexico, 455 U.S. 720, 736 (1982).

Taxing the gambling activities of the INC, which are conducted at the sufferance of the state, does not hamper the activities of the U.S. Government. Prospective application of any tax immunity does not hamper or retard the purpose of the Supremacy Clause.

Finally, the Court of Appeals baldly concludes that retroactive application does not result in any inequity to the City. Its conclusion ignores the facts before the Court. The City's reliance upon the validity of the tax was justified. The state legislation allowing gambling authorized the Red Cross to conduct gambling without an exemption from taxation. In addition, the Red Cross' conduct for six years, including its compliance with all state regulations and payment of all taxes did not alert

the City to any unique status of the Red Cross. The Red Cross never contended that its status entitled it to an exemption from the tax until 1986, six years after beginning its gambling activities. The Red Cross failed to pursue this claim diligently, and did not file this action until November 21, 1988. Further, the Red Cross continued to pay the tax without protest up to and since filing this action. This case satisfies the non-retroactivity doctrine of this Court and the decision should be applied prospectively. The appropriate remedy is cessation of taxation, not refund.

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Based upon the reasons summarized above, the City of Spokane respectfully requests that a writ of certiorari issue.

DATED this 28th day of January, 1991.

JAMES C. SLOANE
City Attorney

Michael A. Nelson
Assistant City Attorney

M. Laurie Flinn Connelly
Assistant City Attorney

ATTORNEYS FOR PETITIONERS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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NO. _____

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CITY OF SPOKANE and PETER G. FORTIN,
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# APPENDICES A -- G
# TO
# PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES of America, Plaintiff,

v.

The CITY OF SPOKANE, Defendant.

No. C-88-627-JLQ.

United States District Court,
E.D. Washington

Aug. 31, 1989.

Government brought action against city in regard to taxes imposed on the Bingo operations of a local chapter of the American Red Cross. Government moved for summary judgment. The District Court, Quackenbush, Chief Judge, held that: (1) the Supremacy Clause precluded city's taxation of the gambling proceeds, and (2) Government was entitled to refund of the taxes paid for the previous six years as well as prejudgment interest on those taxes.

Motion granted.

1. Taxation

City could not impose tax on

gambling proceeds generated by Bingo operations of local chapter of American Red Cross; Bingo games were governmental function of instrumentality of Federal Government. 36 U.S.C.A. Secs. 2, 3, 4a.

2. Taxation

Where city improperly imposed tax on gambling proceeds generated by Bingo operations of local chapter of American Red Cross, Red Cross was entitled to refund of taxes paid to city during previous six-year period and prejudgment interest on those taxes, as applicable statute of limitations was six years. West's RCWA 19.52.010.

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David M. Katinsky, U.S. Dept. of Justice, Washington, D.C., for plaintiff.

James C. Sloane, City Atty., Michael A. Nelson, Laurie Flinn

Connelly, Spokane, Wash., for defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

QUACKENBUSH, Chief Judge.

BEFORE THE COURT are the parties' cross-motions for summary judgment, heard with oral argument on August 28, 1989. David Katinsky and Carroll D. Gray represented plaintiff. James C. Sloane, Michael Nelson and Laurie Flinn Connelly represented defendant.

The United States, on behalf of itself and the Inland Northwest Chapter (INC) of the American National Red Cross, contends that the City of Spokane may not impose tax on gambling proceeds generated by the INC's bingo operation. The argument is based on the allegation that such taxation

violates the Supremacy Clause of the United States Constitution.

The City of Spokane contends that INC is not an instrumentality when acting in the role of a purveyor of gambling, in that gambling is not a vital governmental function. The City further contends that the INC is subject to the Washington State gambling laws and that such regulation includes the tax in question.

Factual Background

The American National Red Cross, the parent organization of the INC, was chartered by Congress in 1905. By statute, the Red Cross is required to comply with the laws of the United States and the individual states. 36 U.S.C. Sec. 2. The purposes of the American National Red Cross are stated in 36 U.S.C. Sec. 3, and include furnishing aid to the sick and wounded

in time of war, and providing voluntary relief. The parent organization establishes, through statutory authority, local chapters such as INC. 36 U.S.C. Sec. 4a. The principal officer of the Red Cross and seven of the 49 other governors composing the Board of Governors, the governing body of the Red Cross, are appointed by the President of the United States.

The Red Cross has been charged by the United States Government with the responsibility of meeting the commitments of the United States under several Geneva conventions, performing services on behalf of the Armed Forces of the United States, and assisting the federal government in providing disaster relief to states when needed.

The federal government has provided substantial assistance to the Red Cross, but has authorized the Red

Cross to sustain itself primarily through independent fund raising. Every year, the Red Cross is required to provide to the Department of Defense a financial report of its activities during the previous year, which is audited by the Department of Defense and transmitted to Congress.

The INC is a duly constituted local unit of the Red Cross, chartered in 1914. The INC is responsible for providing all Red Cross services within its territorial jurisdiction and for raising the funds necessary to make these services available.

The services provided by the INC include the preparation for and operation of disaster relief programs -- including food, shelter, clothing, medical and nursing care, and occupational tools and equipment; providing the emergency communications

link between the people of its territorial jurisdiction and family members serving in the United States Armed Forces concerning the death or critical illness of a family member, providing health promotion and training, including parenting, babysitting, teen pregnancy, and AIDS education, hypertension and cholesterol screening and education, and other community health promotion; and providing volunteer assistance to local hospitals, including the Veterans Administration and military hospitals.

Since 1981, the INC has conducted regular bingo games in compliance with state law. Employees who work in the bingo operations are employees of the Red Cross, not employees of the United States, and have been recognized by the Washington State Gambling Committee. Two of the Red Cross employees have

duties involving both bingo and non-bingo operations. Other employees are only involved in the bingo operations. Those who work exclusively in the bingo operations are paid by the Red Cross under the same nonprofit taxpayer identification number as those who work in other Red Cross operations. Those who work exclusively in the bingo operations participate in the same retirement program, have the same medical coverage, are covered under the same Red Cross liability insurance policy, and are subject to the same by-laws and personnel policies as employees who work in other Red Cross operations.

The City of Spokane has been taxing the revenues of the INC's bingo games and pull tabs since 1982 at 10 percent.

In 1985, INC filed a Request for Tax Refund with the State of Washington Department of Revenue, requesting a refund of all business and occupation taxes paid by the INC to the Department of Revenue subsequent to July 1, 1980. The basis of the petition was the constitutional immunity of the Red Cross from state and local taxation. The Department of Revenue ruled that INC, as a federal instrumentality exempt from taxation, was entitled to the refund and cessation of further taxation.

On February 28, 1986, INC filed a Request for Refund with the City of Spokane, requesting a refund of all gambling taxes imposed upon INC subsequent to July 1, 1980. The request was denied by the City by letter dated May 20, 1986.

## Discussion

[1] The Supremacy Clause of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Supreme Court in McCulloch v. Maryland, 4 Wheat 316 (1819), interpreted the Supremacy Clause as prohibiting the states from taxing the United States and its instrumentalities, unless the United States expressly waived its immunity from state taxation. This court is bound by McCulloch.

In James v. Dravo Contracting, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937), the Court suggested that a state tax is impermissible when the tax

entity is "so intimately connected with the exercise of a power or the performance of a duty" by the Government that taxation of it would be "a direct interference with the functions of government itself." Whether such is the case here can be argued both ways. Plaintiff argues that any organization found to be an instrumentality of the United States Government is immune for any state or local taxation, regardless of the activity the instrumentality is conducting. The City ably argues that the immunity only applies when the subject activity is connected with the performance of a duty.

The United States Supreme Court has unanimously ruled that the American National Red Cross is exempt from state and local taxation and that the immunity has

not been waived. Department of Employment v. United States, 385 U.S. 355, 87 S.Ct. 464, 17 L.Ed.2d 414 (1966). The Court found that Colorado could not impose an unemployment compensation tax upon wages paid to Colorado-based employees of the Red Cross.

> On the merits, we hold that the Red Cross is an instrumentality of the United States for purposes of immunity, and that this immunity has not been waived by congressional enactment. Although there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality, the Red Cross is clearly such an instrumentality.

Id. at 358-50, 87 S.Ct. at 466-67.

The Court held that the Red Cross is a federal instrumentality despite acknowledged differences between it and a typical government agency.

The City relies on United States v. New Mexico, 455 U.S. 720, 102 S.Ct.

proprietary function. The Supreme Court rejected a similar claim in Federal Land Bank v. Kiowa County, 368 U.S. 146, 82 S.Ct. 282, 7 L.Ed.2d 199 (1961).

> Legitimate activities of governments are sometimes classified as "governmental" or "proprietary"; however, our decisions have made it clear that the Federal Government performs no "proprietary" functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed.

Id. at 150-51, 82 S.Ct. at 285-86.

The City has not argued that the Red Cross Charter is unconstitutional or that INC is operating outside the Red Cross Charter in conducting its bingo games. Therefore, it appears clear that the bingo games are a governmental function of an instrumentality of the federal government, rendering the proceeds not

1373, 71 L.Ed.2d 580 (1982). However, the issue in that case was not whether the Red Cross was taxable, as was the issue in Department of Employment, supra. Rather, the issue in New Mexico was "to what extent may a State impose taxes on contractors that do business with the Federal Government?" New Mexico, supra at 722, 102 S.Ct. 15 1376. The Court stated that the taxes involved were not imposed on the "receipts of the United States or any agency or instrumentality thereof." Id. at 728, 102 S.Ct. at 1379.

The City does not dispute that the Red Cross is an instrumentality of the Federal Government as to its governmental functions. However, it argues that gambling is not a necessary governmental function which would invoke immunity from taxation. Rather, the City argues that gambling is a

subject to state and local taxation. Additionally, the bingo games are a way of raising the funds necessary to make the services rendered by the Red Cross and mandated by the Congress available.

The Government contends that almost 30 other states have exempted the Red Cross from state taxation, and it has provided copies of letters from state Attorneys General, all finding that local chapters of the Red Cross are federal instrumentalities, not subject to state and local taxation. However, those cases are distinguishable, in that they have involved sales tax, gasoline tax, and various use and motor vehicle taxes. None of the cases address the issue of gambling. Nevertheless, they support a finding that the Red Cross is not subject to <u>any</u> state or local tax. The City of Spokane has not, and apparently

can not, dispute the other state findings and has not identified any state or federal authority that subjects the Red Cross to any state or local taxation on its respective operations.

Retroactive Application

[2] The City contends that if the court concludes that the INC is immune from taxation by the City, the appropriate relief would be to order the City to cease collecting taxes and that a refund of back taxes is not merited.

The Supreme Court has considered three factors when deciding whether a judicial decision should be given retroactive or prospective application in a federal civil case. Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). The factors are: (1) whether the decision

establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether retroactive operation of the decision will further or retard the purposes of the rule in question; and (3) whether applying the decision retroactively will produce substantial inequitable results. Id. at 106-07, 92 S.Ct. at 355-56.

(1) The court finds that granting tax immunity to a function of the Red Cross will not establish a new principle of law in light of Department of Employment v. United States, supra, 385 U.S. 355, 87 S.Ct. 464.

(2) The underlying purpose of the Supremacy Clause is to prevent a state from taxing an activity so closely

connected to the Government that the two cannot realistically be viewed as separate entities. The Supreme Court in Department of Employment, supra, carefully looked at the relationship between the federal government and the Red Cross and found such to be the case.

(3) In balancing the equities, the third Chevron factors appears to favor the City. Obviously, the City has spent the funds generated by the gambling tax and and they can not be unspent. INC has continued to pay the tax without protest and did not assert any claim for immunity from any taxation until 1985. The record shows that the INC applied for a business and operation tax refund from the State in 1985. The State Department of Revenue found that the Red Cross was an instrumentality of the United States,

and sustained INC's request for a refund. INC applied for a gambling tax refund from the City in February 1986. When the City denied the refund, INC contacted the Department of Justice, which sent a second letter to the City. The City still refused to refund.

Nevertheless, the court finds that the Red Cross must prevail on its Motion for Summary Judgment. The City of Spokane shall forthwith CEASE collecting any gambling tax from the INC. The court further finds that INC is entitled to a REFUND of taxes paid to the City since November 21, 1982 to date, plus interest. As an instrumentality of the United States Government, it is immune from state and local taxation. Congress has not expressly waived that immunity. However, this finding is not based on

the equities of this case. The court notes that gambling is an area clearly and traditionally highly regulated. The court suggests that if local taxes are to be applied to INC's bingo revenue, it is a matter for Congressional action.

Prejudgment Interest

RCW 19.52.010 provides for prejudgment interest at a rate of 12 percent interest. The effective date of the interest rate raise was July 21, 1981.

The award of prejudgment interest is proper when an amount claimed is "liquidated". Maryhill Museum v. Emil's Concrete, 50 Wash.App. 895, 902, 751 P.2d 866 (1988); Prier v. Refrigeration Eng'g Co., 74 Wash.2d 25, 32, 442 P.2d 621 (1968). A claim is liquidated "where the evidence furnishes data which, if believed,

makes it possible to compute the amount with exactness, without reliance on opinion or discretion." Prier v. Refrigeration Eng'g Co., supra.

Here, it is undisputed that the applicable statute of limitation is 6 years. It is possible to compute with exactness the amount of taxes the INC paid to the City of Spokane, which is subject to refund. This action was instituted on November 21, 1988. Therefore, plaintiff shall forthwith serve and file a calculation of all taxes paid to the City from November 21, 1982, until the present time, as well as a calculation of interest at 12 percent due on the money paid to the City in gambling taxes. The City shall file any objections to the calculations within 10 days thereafter.

The court concludes that plaintiff's Motion for Summary Judgment

must be and is HEREBY GRANTED and defendant's Motion for Summary Judgment must be and is HEREBY DENIED. The plaintiff is entitled to recover the gambling taxes paid to the City since November 21, 1982, plus interest thereon at 12 percent per annum. The City may not hereafter collect such taxes from the plaintiff.

IT IS SO ORDERED. The Clerk is directed to enter this opinion and forward copies to counsel.

FOR PUBLICATION

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br>*Plaintiff-Appellee,*<br>v.<br>CITY OF SPOKANE,<br>*Defendant-Appellant.* | No. 90-35118<br>D.C. No.<br>88-627-JLQ<br>OPINION |

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, District Judge, Presiding

Argued and Submitted
October 5, 1990—Seattle, Washington

Filed October 31, 1990

Before: Otto R. Skopil, Jr., Diarmuid F. O'Scannlain and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Fernandez

## SUMMARY

### Taxation

Affirming a district court judgment, the court of appeals held that the Red Cross was immune from state and local taxation on lawfully conducted gambling activities as an instrumentality of the United States.

Appellant City of Spokane is authorized to tax the proceeds of certain gambling activities conducted by charitable or non-

profit organizations. Because the local chapter of the National Red Cross comes within that definition, since 1982 the City of Spokane has levied a gambling tax upon it. Although for some time the local Red Cross chapter paid that tax without protest, it eventually requested a refund of all gambling taxes paid since 1980. The request was denied. The United States brought suit to obtain the refund, with interest, and to enjoin any further levies. The American Red Cross, of which the Spokane local chapter is a member, was created by the United States as a unique charitable institution. The district court granted summary judgment for the government and the City of Spokane appealed.

[1] The Red Cross is an instrumentality of the United States for purposes of immunity from state taxation levied on its operations. This immunity has not been waived by congressional enactment. [2] The court disagreed that the City of Spokane could still levy a tax on the operations of the Red Cross because the gambling activity it engages itself in was not within the authority granted to it as an instrumentality. While the court did not suggest that the Red Cross can engage in illegal activities in pursuit of its goals, there was nothing illegal about the gambling activities the local chapter engaged in here. [3] The court rejected the City of Spokane's argument that the gambling proceeds could still be taxed since the agency was operating as a contractor for the United States. That was not the case here. The Red Cross was not a mere private contractor, it was a United States instrumentality. As an agency imbedded in the structure of the government, the Red Cross acted as an arm of the government. Thus, the City of Spokane improperly imposed the gambling tax upon it. [4] The City of Spokane had to disgorge the taxes it improperly collected from the Red Cross. A long line of Supreme Court authority indicated that retroactivity was required. However, the court also looked at other elements in determining the retroactive application of the remedy. No inequity resulted from this. [5] The only logical relief, aside from precluding further tax levies, was to order that improperly collected

monies be refunded, together with interest, from the date that demand for refund was made.

## COUNSEL

Laurie Flinn Connelly and Michael A. Nelson, Assistant City Attorneys, Spokane, Washington, for the defendant-appellant.

Gary R. Allen, David English Carmack, and Kenneth W. Rosenberg, Attorneys, Tax Division, United States Department of Justice, Washington, D.C., for the plaintiff-appellee.

## OPINION

FERNANDEZ, Circuit Judge:

The United States brought this action against the City of Spokane ("the City") and Spokane's Manager of Finance, Peter Fortin, to preclude the collection of a tax on the gambling proceeds of a local unit of the American National Red Cross, and to recover back taxes, together with interest. The district court granted summary judgment in favor of the United States[1] and the City appealed. We affirm.

### BACKGROUND

The American National Red Cross is a unique charitable institution. It was created by the United States to perform such exceedingly important public functions as aiding "the sick and wounded of Armed Forces in time of war," and carrying on "a system of national and international relief in time of peace" to mitigate "the sufferings caused by pestilence,

[1] *United States v. City of Spokane*, 734 F. Supp. 919 (E.D. Wash. 1989).

famine, fire, floods, and other great national calamities . . . ." 36 U.S.C. § 3. Eight of its fifty governors are appointed by the President of the United States and one of those eight acts as the principal officer of the corporation. 36 U.S.C. § 5(a). While the organization must support itself from public donations and other sources, the United States does supply it with a permanent headquarters building. 36 U.S.C. § 13. The financial reports of the organization are audited by the Department of Defense. 36 U.S.C. § 6.

The Inland Northwest Chapter of the American National Red Cross has been a chartered local organization since 1914. As such it is a local unit of the American National Red Cross. 36 U.S.C. § 4a. We will hereafter refer to the American National Red Cross as the "Red Cross" and the Chapter as the "INC". However, since the INC is a unit of the Red Cross, what we say about the rights and duties of the Red Cross also applies to the INC.

The State of Washington authorizes bona fide charitable or non-profit organizations to conduct bingo, pull-tab, and punchboard games. Wash. Rev. Code § 9.46.0311 (1988).[2] The Red Cross is an organization that comes within that definition. Wash. Rev. Code § 9.46.0209. At the same time, the State of Washington authorizes cities to tax certain of the proceeds of those gambling activities — Wash. Rev. Code § 9.46.110 — and since 1982 the City has levied a gambling tax upon the INC. Spokane, Wash. Ord. § 8.40.020 (1982).

For some time, the INC paid that tax without apparent protest, but in February of 1986 it did protest and requested a refund of all gambling taxes paid since July 1, 1980. The request was denied. The United States then brought this action to obtain the refund, with interest, and to enjoin any further levies.

[2]The citations to the Washington Code are to the current version of that law. Earlier versions were to the same effect, as far as the issues on this appeal are concerned.

Cross motions for summary judgment were filed, and the district court ultimately entered a judgment which required the disgorgement of prior exactions by the City, together with prejudgment interest from the date of the demand for refund. The district court further directed that the City cease further imposition of the tax. This appeal followed.

## JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, and we have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the grant of summary judgment de novo. *Kruso v. International Tel. & Tel.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, _ U.S. _, 110 S. Ct. 3217, 110 L. Ed. 2d 664 (1990). On constitutional questions, this court reviews findings of fact for clear error, and mixed questions of fact and law de novo. *State of Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1226 (9th Cir. 1990); *La Duke v. Nelson*, 762 F.2d 1318, 1322 (1985), *modified*, 796 F.2d 309 (9th Cir. 1986). Questions of law are reviewed de novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46 (1984).

## DISCUSSION

Two major issues confront us. First, is the Red Cross an instrumentality of the United States which is immune from this kind of taxation? Second, if it is, should the INC have been granted a refund of the back taxes? We will discuss each of these issues in turn.

### A. *The Red Cross Is Immune from This Tax*

One of the hoariest principles of federal-state governmental relations is that no state can impose a tax upon an instru-

mentality of the United States Government. As the Supreme Court, speaking through Chief Justice Marshall, eloquently stated in *M'Culloch v. Maryland,* 17 U.S. (Wheat.) 316, 431, 4 L.Ed. 579 (1819), that principle is bottomed upon certain important axioms:

> That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

Nor can it be said that a little taxation, or taxation of just one function or instrumentality, is proper. *M'Culloch* also dealt with those possibilities. The Court said:

> We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give.

*M'Culloch,* 17 U.S. (Wheat.) at 430. The Court continued:

> If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This

> was not intended by the American people. They did not design to make their government dependent on the states.

*M'Culloch,* 17 U.S. (Wheat.) at 432.

[1] Nothing could be more forcefully established, and while those principles alone do not demonstrate that the Red Cross *is* an instrumentality of the United States, there can be no doubt that it is. The Supreme Court made that clear in *Department of Employment v. United States,* 385 U.S. 355, 358, 87 S. Ct 464, 467, 17 L.Ed.2d 414 (1966) where it said, "[W]e hold that the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation levied on its operations, and that this immunity has not been waived by congressional enactment."

At first blush that would appear to dispose of this issue, but the City claims that accretions to the *M'Culloch* doctrine make it inapplicable to the INC activities which were taxed here. That claim is based upon a misreading of the authorities.

[2] The City first points to *Federal Land Bank v. Board of County Comm'rs,* 368 U.S. 146, 82 S. Ct. 282, 7 L.Ed.2d 199 (1961), a case in which the Supreme Court struck down a tax levy on the Federal Land Bank, an instrumentality of the United States. In so doing, the Court indicated that if the activity being performed is not within the authority granted to the instrumentality, for example if it were illegal, taxation may be appropriate. *Federal Land Bank,* 368 U.S. at 152-56, 82 S. Ct. at 287-89. That, however, has no application whatever to this case. There can be no doubt that the Red Cross can engage in activities designed to earn money. In fact, because it is not, for the most part, funded with tax dollars, it must engage in many fund raising activities if it is to survive. While we do not suggest that the Red Cross can engage in ille-

gal activities in pursuit of its goals, there is nothing illegal about the gambling activities the INC engaged in here.

But the City claims that there is still another string to its bow, for some activities of agencies of the United States can be taxed. Here again, when gazing upon the authorities cited one must be purblind if one is to overlook the distinctions between those authorities and this case.

[3] Thus, in *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S. Ct. 208, 82 L.Ed. 155 (1937), a private independent corporation that had contracts with the United States complained about the taxation of its gross receipts. The Court declined to find that a tax on the private entity was a tax upon the government or its instrumentalities, even though the effect of the tax could, in theory, be felt by the government. *James*, 302 U.S. at 161, 58 S. Ct. at 221. That is not this case; the Red Cross is no mere private contractor, it is a United States instrumentality. The same analysis applies to *United States v. New Mexico*, 455 U.S. 720, 102 S. Ct. 1373, 71 L.Ed.2d 580 (1982). There, too, a tax on the receipts of private contractors was attacked; there, too, the tax was sustained. The Court indicated that the mere fact that a contractor acts as an agent of the government does not mean that it is an agency or instrumentality of the government. It does not mean that the contractor stands in the government's shoes. 455 U.S. at 735-36, 102 S. Ct. at 1383. The entities in question were not so integrated into the structure of the government that its tax immunity devolved upon them. Rather, it was realistic to view them as the private entities they were — entities "independent of the United States." 455 U.S. at 738, 102 S. Ct. at 1385. When dealing with entities of that stripe, it is necessary to be extremely careful about parsing their various activities when they claim that a tax falls directly on the United States. The same does not apply when one is dealing with an acknowledged government instrumentality such as the Red Cross. To do so in that instance would engage the courts in the unfit inquiry that *M'Culloch* warned

against. 17 U.S. (Wheat.) at 430. Private independent contractors may be agencies because they act as agents. They are not to be confused with instrumentalities like the Red Cross which are agencies because they were created to carry out functions of the government itself and are, therefore, imbedded in the structure of the government to that extent.[3] As the Supreme Court has said, "both the President and Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the Government." *Department of Employment,* 385 U.S. at 359-60, 87 S. Ct. at 467. The Court agreed with that characterization.

In a final bid to deflect the inexorable force of the law in this area, the City asserts that the Red Cross is not really a tax exempt instrumentality of the government, because we have said that it is not an agency for the purposes of the Freedom of Information Act. *See Irwin Memorial Blood Bank v. American Nat'l Red Cross,* 640 F.2d 1051, 1057 (9th Cir. 1981). That is an astonishing proposition. It suggests that we, in effect, overturned *Department of Employment* when we decided *Irwin Memorial Blood Bank.* We did no such thing. What we did decide was that given the purposes and the background of the Freedom of Information Act, the Red Cross was not an agency within the meaning of that statute. To extrapolate from that holding to the area of the law which we must deal with here would be a serious logical and semantic error. It would insist that an entity incorporated by an act of Congress to carry out essentially public functions is not exempt from taxation as it struggles to accomplish those purposes. It would insist upon that even when the entity's activities are lawful, necessary and in pursuit of its duties as an

[3] *California State Bd. of Equalization v. Sierra Summit, Inc.,* — U.S. —, 109 S. Ct. 2228, 104 L.Ed.2d 910 (1989), and *Washington v. United States,* 460 U.S. 536, 103 S. Ct. 1344, 75 L.Ed.2d 264 (1983), which also uphold taxation of a bankruptcy trustee's sales and private construction contractors' income, respectively, apply the same principles and are to the same effect.

instrumentality of the United States. It would insist upon that based on the fallacy that a word which has a meaning in one context must have the selfsame meaning when transplanted to an entirely different context. We must eschew that extrapolation.

It follows that the City improperly imposed the gambling tax upon INC.

B. *The City Must Disgorge the Taxes It Collected*

The City asserts that even if the tax is invalid, it should not be required to reimburse the INC for the taxes which have already been collected. Discussion of that claim requires analysis of two sub-issues. Should the decision here be given retroactive effect, and, if so, what remedy is proper?

While the issues sometimes seem to be entangled, the Supreme Court has recently been at some pains to untangle them. *See American Trucking Ass'ns, Inc. v. Smith*, _ U.S. _, 110 S. Ct. 2323, 110 L.Ed.2d 148 (1990). In *American Trucking*, the Court pointed out that retroactivity must be decided by use of the analysis outlined in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971). That does not, however, answer the remedy question, a question usually left to the states themselves to work out. *American Trucking*, 110 S. Ct. at 2330. *See also Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 782-84 (9th Cir.), *cert. denied*, 476 U.S. 1170, 106 S. Ct. 2891, 90 L. Ed. 2d 978 (1986), where we, in effect, recognized and applied the distinctions.

Because we need not consider the question of remedy if the effect of our decision is not retroactive, we will first consider retroactivity.[4]

[4]There is much jurisprudential debate about the propriety of any such analysis in the area of the constitution. *See American Trucking*, 110 S. Ct. at 2343 (Scalia, J., concurring). We, of course, cannot enter the arena. We leave the battle to other gladiators.

Our retroactivity analysis must apply the three-part *Chevron Oil* test:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed .... Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." ... Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision ... could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07, 92 S. Ct. at 355 (citations omitted).

**[4]** Our decision striking down this tax does not meet the tests of nonretroactivity. We overrule no precedent here and we do not decide an issue of first impression. As we have shown, our determination regarding the status of the Red Cross does not proceed from some obscure and half-formed idea only now wrested into the light of day. Rather, it proceeds from a long, if sometimes wavy, line of Supreme Court authority. This alone indicates that retroactivity is required. *See Ashland Oil, Inc. v. Caryl*, _ U.S. _, 110 S. Ct. 3202, 3205, 111 L.Ed.2d 734 (1990) (per curiam). However, we will also look to the other elements. We are dealing with a fundamental principle that precludes the taxation of United States governmental functions. Retroactive operation of our decision will surely foster a proper respect for that principle by encouraging local entities to tread carefully when they impose taxes on entities like the Red Cross. Finally, no inequity results

from retroactive application. It is true that the City may already have used the tax money, but at the very least it should have entertained the gravest doubts about its right to collect the tax in the first place. Against that is the inequity to the INC which would be wrought were it forced to forego its claim to recover.[5] Therefore, this decision will apply retroactively.

[5] We turn then to the question of relief. That the INC is entitled to relief can hardly be questioned. It is true that the exact form of relief is often left to the local governmental entity when a tax is struck down as unconstitutional. However, that is typically done in cases where there is a commerce clause violation which can be remedied in any one of a number of ways. *See, e.g., Ashland Oil,* 110 S. Ct. at 3205; *American Trucking,* 110 S. Ct. at 2330; *McKesson Corp.,* 110 S. Ct. at 2252. That approach has no application here, for here, purely and simply, a tax has been exacted from a federal instrumentality. The only logical relief, aside from precluding further taxation, is to order the improperly taken monies refunded. That was the course adopted in *Department of Employment,* 385 U.S. at 357, 87 S. Ct. at 466. It is the course the district court adopted; it is the course we adopt today.

## CONCLUSION

The Red Cross is a United States Government instrumentality which is immune from state and local taxation when it is lawfully pursuing its mandated purposes. Here, the INC was engaged in fundraising by lawfully conducting certain gambling activities. The City erred when it levied a tax on those activities.

[5]There is no assertion that this action is barred by the statute of limitations. Nor is there a claim that payment under protest was required by Washington law. *Cf. McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* ___ U.S. ___, 110 S. Ct. 2238, 2243-44 n.4, 110 L.Ed.2d 17 (1990).

Thus, the City must cease making that levy and must refund back taxes together with interest from the date that the INC made its demand — February 28, 1986.

AFFIRMED.

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FOR PUBLICATION

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br>*Plaintiff-Appellee,*<br>v.<br>CITY OF SPOKANE,<br>*Defendant-Appellant.* | No. 90-35118<br>D.C. No.<br>CV-88-627-JLQ<br>ORDER GRANTING MOTION FOR CLARIFICATION AND AMENDING OPINION |

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, District Judge, Presiding

Argued and Submitted
October 5, 1990—Seattle, Washington

Filed October 31, 1990
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Before: Otto R. Skopil, Jr., Diarmuid F. O'Scannlain and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Fernandez

## SUMMARY

### Taxation

Affirming a district court judgment, the court of appeals held that the Red Cross was immune from state and local tax-

ation on lawfully conducted gambling activities as an instrumentality of the United States.

Appellant City of Spokane is authorized to tax the proceeds of certain gambling activities conducted by charitable or nonprofit organizations. Because the local chapter of the National Red Cross comes within that definition, since 1982 the City of Spokane has levied a gambling tax upon it. Although for some time the local Red Cross chapter paid that tax without protest, it eventually requested a refund of all gambling taxes paid since 1980. The request was denied. The United States brought suit to obtain the refund, with interest, and to enjoin any further levies. The American Red Cross, of which the Spokane local chapter is a member, was created by the United States as a unique charitable institution. The district court granted summary judgment for the government and the City of Spokane appealed.

[1] The Red Cross is an instrumentality of the United States for purposes of immunity from state taxation levied on its operations. This immunity has not been waived by congressional enactment. [2] The court disagreed that the City of Spokane could still levy a tax on the operations of the Red Cross because the gambling activity it engages itself in was not within the authority granted to it as an instrumentality. While the court did not suggest that the Red Cross can engage in illegal activities in pursuit of its goals, there was nothing illegal about the gambling activities the local chapter engaged in here. [3] The court rejected the City of Spokane's argument that the gambling proceeds could still be taxed since the agency was operating as a contractor for the United States. That was not the case here. The Red Cross was not a mere private contractor, it was a United States instrumentality. As an agency imbedded in the structure of the government, the Red Cross acted as an arm of the government. Thus, the City of Spokane improperly imposed the gambling tax upon it. [4] The City of Spokane had to disgorge the taxes it improperly collected from the Red Cross. A long line of Supreme Court

authority indicated that retroactivity was required. However, the court also looked at other elements in determining the retroactive application of the remedy. No inequity resulted from this. [5] The only logical relief, aside from precluding further tax levies, was to order that improperly collected monies be refunded, together with interest, from the date that demand for refund was made.

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## COUNSEL

Laurie Flinn Connelly and Michael A. Nelson, Assistant City Attorneys, Spokane, Washington, for the defendant-appellant.

Gary R. Allen, David English Carmack, and Kenneth W. Rosenberg, Attorneys, Tax Division, United States Department of Justice, Washington, D.C., for the plaintiff-appellee.

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## ORDER

Appellant's Motion for Clarification filed November 7, 1990 is granted, and the opinion filed in this case on October 31, 1990 is amended as follows:

At page 13503, the first sentence is deleted and is replaced with the following:

> Thus, the City must cease making that levy and must refund back taxes paid by the INC since November 21, 1982, together with interest from February 28, 1986, the date that the INC made its demand.

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## OPINION

FERNANDEZ, Circuit Judge:

The United States brought this action against the City of Spokane ("the City") and Spokane's Manager of Finance, Peter Fortin, to preclude the collection of a tax on the gambling proceeds of a local unit of the American National Red Cross, and to recover back taxes, together with interest. The district court granted summary judgment in favor of the United States[1] and the City appealed. We affirm.

## BACKGROUND

The American National Red Cross is a unique charitable institution. It was created by the United States to perform such exceedingly important public functions as aiding "the sick and wounded of Armed Forces in time of war," and carrying on "a system of national and international relief in time of peace" to mitigate "the sufferings caused by pestilence, famine, fire, floods, and other great national calamities . . . ." 36 U.S.C. § 3. Eight of its fifty governors are appointed by the President of the United States and one of those eight acts as the principal officer of the corporation. 36 U.S.C. § 5(a). While the organization must support itself from public donations and other sources, the United States does supply it with a permanent headquarters building. 36 U.S.C. § 13. The financial reports of the organization are audited by the Department of Defense. 36 U.S.C. § 6.

The Inland Northwest Chapter of the American National Red Cross has been a chartered local organization since 1914. As such it is a local unit of the American National Red Cross. 36 U.S.C. § 4a. We will hereafter refer to the American National Red Cross as the "Red Cross" and the Chapter as the "INC". However, since the INC is a unit of the Red Cross,

[1] *United States v. City of Spokane*, 734 F. Supp. 919 (E.D. Wash. 1989).

what we say about the rights and duties of the Red Cross also applies to the INC.

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Cross motions for summary judgment were filed, and the district court ultimately entered a judgment which required the disgorgement of prior exactions by the City, together with prejudgment interest from the date of the demand for refund. The district court further directed that the City cease further imposition of the tax. This appeal followed.

## JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, and we have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the grant of summary judgment de novo. *Kruso*

[2]The citations to the Washington Code are to the current version of that law. Earlier versions were to the same effect, as far as the issues on this appeal are concerned.

*v. International Tel. & Tel.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, _ U.S. _, 110 S. Ct. 3217, 110 L. Ed. 2d 664 (1990). On constitutional questions, this court reviews findings of fact for clear error, and mixed questions of fact and law de novo. *State of Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1226 (9th Cir. 1990); *La Duke v. Nelson*, 762 F.2d 1318, 1322 (1985), *modified*, 796 F.2d 309 (9th Cir. 1986). Questions of law are reviewed de novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46 (1984).

## DISCUSSION

Two major issues confront us. First, is the Red Cross an instrumentality of the United States which is immune from this kind of taxation? Second, if it is, should the INC have been granted a refund of the back taxes? We will discuss each of these issues in turn.

### A. *The Red Cross Is Immune from This Tax*

One of the hoariest principles of federal-state governmental relations is that no state can impose a tax upon an instrumentality of the United States Government. As the Supreme Court, speaking through Chief Justice Marshall, eloquently stated in *M'Culloch v. Maryland*, 17 U.S. (Wheat.) 316, 431, 4 L.Ed. 579 (1819), that principle is bottomed upon certain important axioms:

> That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

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> We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give.

*M'Culloch,* 17 U.S. (Wheat.) at 430. The Court continued:

> If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states.

*M'Culloch,* 17 U.S. (Wheat.) at 432.

**[1]** Nothing could be more forcefully established, and while those principles alone do not demonstrate that the Red Cross *is* an instrumentality of the United States, there can be no doubt that it is. The Supreme Court made that clear in *Department of Employment v. United States,* 385 U.S. 355, 358, 87 S. Ct 464, 467, 17 L.Ed.2d 414 (1966) where it said, "[W]e hold that the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation

levied on its operations, and that this immunity has not been waived by congressional enactment."

At first blush that would appear to dispose of this issue, but the City claims that accretions to the *M'Culloch* doctrine make it inapplicable to the INC activities which were taxed here. That claim is based upon a misreading of the authorities.

[2] The City first points to *Federal Land Bank v. Board of County Comm'rs,* 368 U.S. 146, 82 S. Ct. 282, 7 L.Ed.2d 199 (1961), a case in which the Supreme Court struck down a tax levy on the Federal Land Bank, an instrumentality of the United States. In so doing, the Court indicated that if the activity being performed is not within the authority granted to the instrumentality, for example if it were illegal, taxation may be appropriate. *Federal Land Bank,* 368 U.S. at 152-56, 82 S. Ct. at 287-89. That, however, has no application whatever to this case. There can be no doubt that the Red Cross can engage in activities designed to earn money. In fact, because it is not, for the most part, funded with tax dollars, it must engage in many fund raising activities if it is to survive. While we do not suggest that the Red Cross can engage in illegal activities in pursuit of its goals, there is nothing illegal about the gambling activities the INC engaged in here.

But the City claims that there is still another string to its bow, for some activities of agencies of the United States can be taxed. Here again, when gazing upon the authorities cited one must be purblind if one is to overlook the distinctions between those authorities and this case.

[3] Thus, in *James v. Dravo Contracting Co.,* 302 U.S. 134, 58 S. Ct. 208, 82 L.Ed. 155 (1937), a private independent corporation that had contracts with the United States complained about the taxation of its gross receipts. The Court declined to find that a tax on the private entity was a tax upon the government or its instrumentalities, even though the

effect of the tax could, in theory, be felt by the government. *James*, 302 U.S. at 161, 58 S. Ct. at 221. That is not this case; the Red Cross is no mere private contractor, it is a United States instrumentality. The same analysis applies to *United States v. New Mexico*, 455 U.S. 720, 102 S. Ct. 1373, 71 L.Ed.2d 580 (1982). There, too, a tax on the receipts of private contractors was attacked; there, too, the tax was sustained. The Court indicated that the mere fact that a contractor acts as an agent of the government does not mean that it is an agency or instrumentality of the government. It does not mean that the contractor stands in the government's shoes. 455 U.S. at 735-36, 102 S. Ct. at 1383. The entities in question were not so integrated into the structure of the government that its tax immunity devolved upon them. Rather, it was realistic to view them as the private entities they were — entities "independent of the United States." 455 U.S. at 738, 102 S. Ct. at 1385. When dealing with entities of that stripe, it is necessary to be extremely careful about parsing their various activities when they claim that a tax falls directly on the United States. The same does not apply when one is dealing with an acknowledged government instrumentality such as the Red Cross. To do so in that instance would engage the courts in the unfit inquiry that *M'Culloch* warned against. 17 U.S. (Wheat.) at 430. Private independent contractors may be agencies because they act as agents. They are not to be confused with instrumentalities like the Red Cross which are agencies because they were created to carry out functions of the government itself and are, therefore, imbedded in the structure of the government to that extent.[3] As the Supreme Court has said, "both the President and Congress have recognized and acted in reliance upon the Red Cross'

[3] *California State Bd. of Equalization v. Sierra Summit, Inc.*, — U.S. —, 109 S. Ct. 2228, 104 L.Ed.2d 910 (1989), and *Washington v. United States*, 460 U.S. 536, 103 S. Ct. 1344, 75 L.Ed.2d 264 (1983), which also uphold taxation of a bankruptcy trustee's sales and private construction contractors' income, respectively, apply the same principles and are to the same effect.

status virtually as an arm of the Government." *Department of Employment,* 385 U.S. at 359-60, 87 S. Ct. at 467. The Court agreed with that characterization.

In a final bid to deflect the inexorable force of the law in this area, the City asserts that the Red Cross is not really a tax exempt instrumentality of the government, because we have said that it is not an agency for the purposes of the Freedom of Information Act. *See Irwin Memorial Blood Bank v. American Nat'l Red Cross,* 640 F.2d 1051, 1057 (9th Cir. 1981). That is an astonishing proposition. It suggests that we, in effect, overturned *Department of Employment* when we decided *Irwin Memorial Blood Bank.* We did no such thing. What we did decide was that given the purposes and the background of the Freedom of Information Act, the Red Cross was not an agency within the meaning of that statute. To extrapolate from that holding to the area of the law which we must deal with here would be a serious logical and semantic error. It would insist that an entity incorporated by an act of Congress to carry out essentially public functions is not exempt from taxation as it struggles to accomplish those purposes. It would insist upon that even when the entity's activities are lawful, necessary and in pursuit of its duties as an instrumentality of the United States. It would insist upon that based on the fallacy that a word which has a meaning in one context must have the selfsame meaning when transplanted to an entirely different context. We must eschew that extrapolation.

It follows that the City improperly imposed the gambling tax upon INC.

B. *The City Must Disgorge the Taxes It Collected*

The City asserts that even if the tax is invalid, it should not be required to reimburse the INC for the taxes which have already been collected. Discussion of that claim requires anal-

ysis of two sub-issues. Should the decision here be given retroactive effect, and, if so, what remedy is proper?

While the issues sometimes seem to be entangled, the Supreme Court has recently been at some pains to untangle them. *See American Trucking Ass'ns, Inc. v. Smith*, _ U.S. _, 110 S. Ct. 2323, 110 L.Ed.2d 148 (1990). In *American Trucking*, the Court pointed out that retroactivity must be decided by use of the analysis outlined in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971). That does not, however, answer the remedy question, a question usually left to the states themselves to work out. *American Trucking*, 110 S. Ct. at 2330. *See also Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 782-84 (9th Cir.), *cert. denied*, 476 U.S. 1170, 106 S. Ct. 2891, 90 L. Ed. 2d 978 (1986), where we, in effect, recognized and applied the distinctions.

Because we need not consider the question of remedy if the effect of our decision is not retroactive, we will first consider retroactivity.[4]

Our retroactivity analysis must apply the three-part *Chevron Oil* test:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed .... Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospec-

[4]There is much jurisprudential debate about the propriety of any such analysis in the area of the constitution. *See American Trucking*, 110 S. Ct. at 2343 (Scalia, J., concurring). We, of course, cannot enter the arena. We leave the battle to other gladiators.

> tive operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision . . . could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07, 92 S. Ct. at 355 (citations omitted).

**[4]** Our decision striking down this tax does not meet the tests of nonretroactivity. We overrule no precedent here and we do not decide an issue of first impression. As we have shown, our determination regarding the status of the Red Cross does not proceed from some obscure and half-formed idea only now wrested into the light of day. Rather, it proceeds from a long, if sometimes wavy, line of Supreme Court authority. This alone indicates that retroactivity is required. *See Ashland Oil, Inc. v. Caryl*, _ U.S. _, 110 S. Ct. 3202, 3205, 111 L.Ed.2d 734 (1990) (per curiam). However, we will also look to the other elements. We are dealing with a fundamental principle that precludes the taxation of United States governmental functions. Retroactive operation of our decision will surely foster a proper respect for that principle by encouraging local entities to tread carefully when they impose taxes on entities like the Red Cross. Finally, no inequity results from retroactive application. It is true that the City may already have used the tax money, but at the very least it should have entertained the gravest doubts about its right to collect the tax in the first place. Against that is the inequity to the INC which would be wrought were it forced to forego its claim to recover.[5] Therefore, this decision will apply retroactively.

[5]There is no assertion that this action is barred by the statute of limitations. Nor is there a claim that payment under protest was required by Washington law. *Cf. McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, _ U.S. _, 110 S. Ct. 2238, 2243-44 n.4, 110 L.Ed.2d 17 (1990).

[5] We turn then to the question of relief. That the INC is entitled to relief can hardly be questioned. It is true that the exact form of relief is often left to the local governmental entity when a tax is struck down as unconstitutional. However, that is typically done in cases where there is a commerce clause violation which can be remedied in any one of a number of ways. *See, e.g., Ashland Oil,* 110 S. Ct. at 3205; *American Trucking,* 110 S. Ct. at 2330; *McKesson Corp.,* 110 S. Ct. at 2252. That approach has no application here, for here, purely and simply, a tax has been exacted from a federal instrumentality. The only logical relief, aside from precluding further taxation, is to order the improperly taken monies refunded. That was the course adopted in *Department of Employment,* 385 U.S. at 357, 87 S. Ct. at 466. It is the course the district court adopted; it is the course we adopt today.

## CONCLUSION

The Red Cross is a United States Government instrumentality which is immune from state and local taxation when it is lawfully pursuing its mandated purposes. Here, the INC was engaged in fundraising by lawfully conducting certain gambling activities. The City erred when it levied a tax on those activities.

Thus, the City must cease making that levy and must refund back taxes paid by the INC since November 21, 1982, together with interest from February 28, 1986, the date that the INC made its demand.

AFFIRMED.

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UNITED STATES CODE

Section 3. Purposes of corporation

The purposes of the corporation are and shall be --

First. To furnish volunteer aid to the sick and wounded of Armed Forces in time of war, in accordance with the spirit and conditions of the conference of Geneva of October, eighteen hundred and sixty-three, and also of the treaties of the Red Cross, or the treaties of Geneva, of August twenty-second, eighteen hundred and sixty-four, and July twenty-seventh, nineteen hundred and twenty-nine, to which the United States of America has given its adhesion, and also of any other treaty or convention similar in purpose to which the United States of America may hereafter give its adhesion.

. . .

. . .

Fourth. To act in matters of voluntary relief and in accord with the military autorities as a medium of communication between the people of the United States of America and their Armed Forces, and to act in such matters between similar national societies of other governments through the "Comitee International de Secours", and the Government and the people and the Armed Forces of the United States of America.

Fifth. And to continue and carry on a system of national and international relief in time of peace and apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other great national calamities, and to devise and carry on measures for preventing the same.

REVISED CODE OF WASHINGTON

9.46.0311. Charitable, nonprofit organizations--Authorized gambling activities

The legislature hereby authorizes bona fide charitable or nonprofit organizations to conduct bingo games, raffles, amusement games, and fund raising events, and to utilize punch boards and pull-tabs . . . .

REVISED CODE OF WASHINGTON

9.46.0209. "Bona fide charitable or nonprofit organization"

"Bona fide charitable or nonprofit organization," as used in this chapter, means: . . .

(2) any corporation which has been incorporated under Title 36 U.S.C. and whose principal purposes are to furnish volunteer aid to members of the armed forces of the United States and also to carry on a system of national and international relief and to apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other national calamities and to devise and carry on measures for preventing the same. . . .

REVISED CODE OF WASHINGTON

9.46.110. Taxation of gambling activities--Limitations--Restrictions on punch boards and pull-tabs

The legislative authority of any county, city-county, city, or town, by local law and ordinance, and in accordance with the provisions of this chapter and rules and regulations promulgated hereunder, may provide for the taxing of any gambling activity authorized by this chapter within its jurisdiction, the tax receipts to go to the county, city-county, city, or town so taxing the same: . . .

SPOKANE MUNICIPAL CODE

8.04.020 Tax Levied.

There is levied upon every person, association and organization conducting or operating within the city any gambling activity authorized by state law a tax upon gross receipts or gross revenues of the activity as follows:

. . .

B. bingo games or raffles, gross revenues less cash prizes and less the amount paid for merchandise prizes actually awarded during the taxable period, multiplied by ten percent;

C. punchboards and pull tabs, five percent of gross revenue in the business in which such punchboards and pull tabs are displayed or utilized.